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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents

v.

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHEAL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Charles W. Johns, Esquire
Alan C. Milstein, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102
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Legal Counsel to the Administrator of Pennsylvania Courts
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STATEMENT OF QUESTIONS PRESENTED

1. Whether 42 U.S.C. §1988 sanctions an award of attorney's fees to second counsel, retained solely to prosecute a fee petition, for more hours than that which original counsel would have spent, at a rate higher than original counsel would have received?

2. Whether judicial immunity bars an award of attorney s fees against judicial officers acting in their judicial capacity?

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STATEMENT OF MATERIAL FACTS

Plaintiffs commenced the underlying civil-rights action in March 1978 seeking declaratory and injunctive relief against an alleged unconstitutional practice of the District Justices of Beaver County, Pennsylvania. While the action was pending, Petitioners changed their policy and the case was dismissed for mootness.

Thereafter, Plaintiffs' counsel, Neighborhood Legal Services, filed a motion for attorney's fees pursuant to 42 U.S.C. §1988, which was denied on the ground of judicial immunity. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit, which reversed the District Court and held that the doctrine of judicial immunity did not bar an award of attorney's fees against judicial officers acting in their judicial capacity. *Morrison v. Ayoob*, 627 F.2d 699 (3d Cir. 1980). Petitioners then sought and were denied review by this Court. *Morrison v. Ayoob*, 449 U.S. 1102 (1981).

On remand Neighborhood Legal Services retained the firm of Titus, Marcus & Shapira to represent them in the fee proceedings. Ultimately, the District Court awarded attorney's fees and costs in the amount of $17,910 to Neighborhood Legal Services and $6,501.20 to the Titus firm. (Exhibit 3) The fees to the Titus firm were for 68 hours of work. Included in those hours was time spent to "review all relevant briefs and background and experience of N.L.S.A. attorneys who worked on the case," time spent to prepare "two petitions for attorneys' fees," and time spent by a junior associate to observe a deposition and two hearings in the District Court. (Exhibit 2)

While Neighborhood Legal Services attorneys were compensated at a rate of $40 per hour for trial work and $70 per hour for appellate work, the Titus firm was compensated at a rate of $110 per hour for the senior partner's time and $45 per hour for the junior associate's time.

Petitioners appealed to the United States Court of Appeals for the Third Circuit, which affirmed the award entered by the District Court. *Morrison v. Ayoob*, No. 83-5336 (3d Cir. January 16, 1984) (Exhibit 4). Petitioners then filed a Petition for Rehearing, which was denied with four Judges dissenting. *Morrison v. Ayoob*, No. 83-5336 (3d Cir. February 15, 1984) (Exhibit 5).

ARGUMENT

1. The court below erred in awarding second counsel, retained by prevailing party's counsel solely to prosecute the fee petition, fees in excess of that which original counsel would have received had it performed the work.

One vitally important question presented by this case is whether separate counsel, retained by a prevailing party's counsel solely to prepare and prosecute the fee petition, may be compensated under 42 U.S.C. §1988 for more hours than that which original counsel would have spent, and at a rate higher than that which original counsel would have received.

This question, not heretofore answered by this Court, has ramifications far beyond the instant case, since it relates in general to any award of attorney's fees in civil-rights cases. While public policy may favor an award to a prevailing party's attorney in a particular case, the public, which must foot the bill for such fees when the suit is against the government, is disserved by the decision of the court below because such a ruling undoubtedly must discourage the government from contesting fee petitions however unreasonable or excessive. Such a chilling effect is inevitable when the potential challenger to a fee petition is aware that the final bill may include fees for the prevailing party's retained separate counsel whose normal hourly rates are double or triple original counsel's and who may rack up hours as if the case were starting anew.

Petitioners do not dispute that attorneys prosecuting civil-rights actions may be entitled to compensation, under 42 U.S.C. §1988, for time spent preparing fee petitions. *See Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978). Nor do Petitioners dispute the propriety of awarding the compensation which prevailing counsel would have earned to separate fee counsel for work performed at the behest of original counsel. It should be of

no consequence to Petitioners that prevailing counsel had made the decision to farm out the work. This is not the case, however, when, solely because of that exercise of original counsel's professional judgment, Petitioners' fee liability is inflated.

In the instant case, separate fee counsel was compensated for sixty-eight (68) hours of services rendered over what, in essence, were secondary and noncomplex matters. This is more time than the fifty-four (54) hours Neighborhood Legal Services spent researching, briefing and arguing matters of substantial complexity before the Court of Appeals. Had Neighborhood Legal Services attorneys handled the fee aspects of the case, the record indicates that it would have expended less hours for the same work, since it would not have had to "review all relevant briefs and backgrounds and experience" of original counsel (Exhibit 2), it would not have had to research and prepare two petitions for attorney's fees, and, presumably, it would not have had the luxury of sending a junior associate to the hearings and the deposition solely to observe the goings on and thereby garner legal experience.

In addition, while Neighborhood Legal Services attorneys were compensated at a rate of $40 per hour for trial time and $70 per hour for appellate time, the District Court additionally awarded that fee counsel be compensated at a rate of $110 per hour for the senior attorney and $45 per hour for the junior associate. Under the District Court's or the Third Circuit's reasoning, however, it presumably would not have made a difference if Louis Nizer or Melvin Belli had been retained as fee counsel at their normal and no doubt well-deserved fee of $300 or $350 per hour. (The hourly rates of these two attorneys are published at 6:25 Nat'l L.J. 28.) Such an untoward result should not be permitted. As Judge Adams stated in his dissent to Petitioners' Petition for Rehearing, the Court should not sanction "such a large award of fees when one set of counsel hires more expen-

sive counsel to advance a fee petition." *Morrison v. Ayoob*, No. 83-5336, Slip Op. at 2 (3d Cir. February 15, 1984) (Adams, J., dissenting, joined by Hunter, Weis and Becker, J.J.) (Exhibit 5).

The Third Circuit's conclusion that such fees should be awarded is contrary to the conclusions of the few courts which have spoken to the issue. In *Shadis v. Beal*, 703 F.2d 71, 73 (3d Cir. 1983), the Third Circuit itself held that attorney's fees for preparation of a fee petition may be awarded to second counsel only to the extent that the fee counsel "stands in the shoes" of the original counsel. Accordingly, the Court would not allow those fees which accrue "only because a second firm has entered the lawsuit." *Id.* This was also the conclusion reached in *Hall v. City of Auburn*, 567 F.Supp. 1222, 1227 (D. Maine 1983), in which the court stated that the policies of §1988 required only that second counsel be awarded costs which would have been incurred had original counsel "personally" prosecuted the fee application.

One other case in which this issue arose was *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D. D.C. 1983). The court in *Laffey* declined to pass judgment on the appropriateness of original counsel's retaining separate fee counsel, leaving to the former the decision as to how a fee application is most effectively prepared. Chief Judge Robinson concluded, however, that "[c]ounsel is not free . . . to exercise its judgment in a fashion that unnecessarily inflates the losing party's fee liability, e.g. (sic) by injecting an additional layer of attorneys into the case." Accordingly, the court reasoned, fees that original counsel would not have accumulated had it prosecuted its own application "cannot be charged to its opponent." *Id.*

This reasoning is not inconsistent with the purpose of 42 U.S.C. §1988, which is to encourage individuals deprived of constitutional rights to seek redress by elimi-

nating the financial barriers to litigation. *Staten v. City of Pittsburgh*, 638 F.2d 599 (3d Cir. 1980). Awarding compensation to more expensive fee counsel in no way touches the concerns or the resolve of the civil-rights plaintiff; it inures only to the benefit of plaintiff's counsel, who has decided that its fee application could most effectively be prepared by other counsel. Furthermore, the increased costs to the losing party, and to the public on whose shoulders the costs must fall, are not a consequence of any unconstitutional action, but are solely the result of original counsel exercising its professional judgment.

Petitioners and their counsel are well-aware that the disputed sum in this case is relatively small. But larger sums and issues are at stake here. This is not a case such as *Laffey, supra*, in which the court implied that defense counsel was motivated, in part, by the racking up of its own billable hours in contesting the fee award. In the case *sub judice*, Petitioners' counsel, as counsel to the Court Administrator of Pennsylvania, must work not only for its judicial clients in a particular case, but for the court system in general and the public it serves. Here, to ensure that fee petitions are challenged by government lawyers when unreasonable or excessive and that only those fees are awarded for the prosecution of fee petitions which original counsel would have received, the interest of the public commands Petitioners to pursue this matter and, utlimately, commands a result in Petitioners' favor.

2. The doctrine of judicial immunity bars awards of attorney's fees pursuant to 42 U.S.C. §1988 against members of the judiciary for actions taken in their judicial capacity.

This matter also presents the identical question involved in the currently pending case of *Allen v. Burke*, 690 F.2d 376 (4th Cir. 1982), *cert. granted, sub nom.*,

Pulliam v. Allen, 51 U.S.L.W. 3770 (April 25, 1983) (No. 82-1433) (argued November 2, 1983): to wit, whether the doctrine of judicial immunity bars recovery of attorney's fees under 42 U.S.C. §1988 from judicial officers in their judicial capacity. Accordingly, Petitioners herein incorporate and reaffirm the arguments made by the Court Administrator of Pennsylvania in his Amicus Curiae Brief filed in *Pulliam*.

To briefly summarize those arguments, this Court held, in *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), that a congressional abrogation of judicial immunity would not be presumed absent express legislative intent. The evidence of such intent is at best ambiguous and is not sufficient to support the conclusion that Section 1988 effectively abolished a well-established common-law doctrine necessary for proper judicial function. *See Pierson v. Ray, supra*, 18 L.Ed.2d at 294-95.

Furthermore, assuming, *arguendo*, that Congress did intend to abolish judicial immunity, this action was violative of the constitutional guarantees of fundamental fairness and due process. Judicial immunity guarantees that parties receive a fair trial in a fair tribunal and, thus, as a doctrine intended to prevent even the possibility of unfairness, it is an essential requirement of due process.

As was eloquently stated more than 100 years ago in *Scott v. Stansfield*, L.R., 3 Ex 220, 223 (1868):

> [I]t is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be a liberty to exercise their functions with independence and without fear of the consequences.

Quoted in *Bradley v. Fisher*, 13 Wall. 335, 349, 20 L.Ed. 646, 650 (1871).

Hence, the independence of the judiciary from vexatious lawsuits of dissatisfied parties must remain intact

to avoid a chill on the unbiased discretion and decisions of judicial officers. Absent a cloak of judicial immunity, the very source of justice would be poisoned and a system would be introduced that could best be characterized as servile and incapable of impartiality, as it was conceived in the concept of due process. *See Taffey v. Downes*, 13 Eng.Rep. 15, 17 (C.P. Ireland 1813); *Lining v. Bentham*, 2 S.C.L. (2 Bay) 1, 3 (1796).

Furthermore, no practical distinction can be made between the relative effects of an award of damages and an award of attorney's fees on what this Court has characterized as the solidly established policy of judicial independence for the benefit of the public. *Pierson v. Ray*, 386 U.S. at 554, 18 L.Ed.2d at 294-95. Awards of astronomical attorney's fees in civil-rights cases are by now legion. *See, e.g., Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D. D.C. 1983) (award of $1,981,565). Hence, the policy behind immunizing the judiciary from damages liability carries equal weight in the consideration of whether judges should be immune from liability for attorney's fees. This Court should not retreat from the principle that the judiciary shall be free to act upon its own convictions, thereby maximizing the probability of receiving due process, a principle long held to be of "the highest importance." *Bradley v. Fisher*, 13 Wall. 335, 349, 20 L.Ed. 646 (1871).

The court below declined to reconsider its prior holding on this issue and instead held that the law of the case precluded a finding in Petitioners' favor on whether 42 U.S.C. §1988 abrogated, in part, the doctrine of judicial immunity. As this Court concluded recently, however, the law of the case simply directs a court's discretion; it does not limit a tribunal's power to disregard the doctrine in exceptional circumstances. *State of Arizona v. State of California*, ____ U.S. ____, 75 L.Ed.2d 318, 103 S.Ct. ____ (1983). *See also White v. Murtha*, 377 F.2d 428 (5th Cir. 1967) (law-of-the-case doctrine not inexorable command and may be eschewed when prior

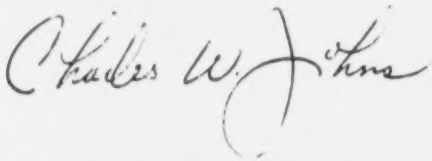
decision erroneous and would work manifest injustice). Just such exceptional circumstances are present in the instant case, since the eroding of the vitally important doctrine of judicial immunity would work a manifest injustice not just to Petitioners, but to all litigants in the Commonwealth, who rely on an independent and resolute judiciary. Since, as argued above, the principles supporting absolute judicial immunity are of "the highest importance," one can conceive of few circumstances which are more exceptional than the present one.

Furthermore, it is well-settled that the doctrine of law of the case may also be avoided when there has been an intervening change in the law. *White v. Murtha*, *supra*. While, at this writing, no such change has occurred, an intervening decision in *Pulliam*, *supra*, in favor of the position urged herein would be dispositive of a decision reversing the court below. Indeed, in dissenting from the denial of Petitioners' Petition for Rehearing, four judges of the Third Circuit stated they would have held the instant matter under advisement until this Court reached a decision in *Pulliam*. *Morrison v. Ayoob*, No. 83-5336, Slip Op. at 3 (February 15, 1984) (Adams, J., dissenting, joined by Hunter, Weis and Becker, J.J.) (Exhibit 5).

CONCLUSION

For the above-stated reason, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,



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(215) 496-4500
Legal Counsel to the
Administrator of
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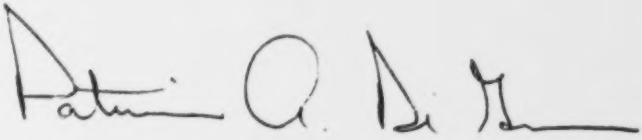
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of March 1984, she personally caused to be served upon the following a true and correct copy of Petition for Writ of Certiorari, by mailing same, first class and postage prepaid to:

Paul H. Titus, Esquire
624 Oliver Building
Pittsburgh, PA 15222

Counsel for Respondents



Patricia A. DiGenova
Appellate Division
Production Coordinator

APPENDIX

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-267

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Plaintiffs,

v.

JOHN J. AYOOB, HUGO R. IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH J. LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE SHAFFER, MILTON H. RICHAEL, individually, and as District Magistrates in the County of Beaver, and their successors in office,

Defendants.

PETITION OF PLAINTIFFS AND PLAINTIFFS' COUNSEL FOR ATTORNEYS' FEES

AND NOW, come the plaintiffs and their attorneys Neighborhood Legal Services Association and Titus Marcus & Shapira, and request this Honorable Court to award attorneys' fees pursuant to 42 U.S.C. §1988 in accordance with the mandate of the United States Court of Appeals for the Third Circuit (No. 79-1923, Filed July 29, 1980). In support thereof, plaintiffs set forth the following:

1. Plaintiffs' attorneys were retained to bring this class action proceeding on behalf of indigents residing in Beaver County, Pennsylvania. Plaintiffs instituted this action for declaratory and injunctive relief against defendants, district justices of Beaver County in their individual and official capacities, to challenge the defendants' practices of sentencing to prison for summary offenses

convicted indigents without affording the indigents their constitutionally-protected right to counsel and of incarcerating defendants in summary proceedings because of their indigency. Plaintiffs' Amended Complaint sought costs and fees pursuant to 42 U.S.C. §1988.

2. After initiation of this litigation, defendants were ordered by the President Judge of the Court of Common Pleas of Beaver County to comply with the state and federal requirements concerning right to counsel and sentencing patterns raised by plaintiffs in this litigation. By virtue of attaining this result, as held by this Court and affirmed by the Third Circuit Court of Appeals, plaintiffs are "prevailing parties" under 42 U.S.C. §1988. Accordingly, plaintiffs are entitled to attorneys' fees and costs.

3. Since initiation of this lawsuit, Timothy O'Brien has served as co-lead counsel in the above-captioned case. Mr. O'Brien is currently Housing Coordinator for Neighborhood Legal Services and was a Staff Attorney at the time of trial.

4. As a Staff Attorney for NLSA, John W. DiNeen served as co-lead counsel during trial of this case. He is currently Housing Coordinator for Rhode Island Legal Services Association in Providence, Rhode Island.

5. James P. O'Connell, co-counsel in this matter, is currently Managing Attorney for NLSA and occupied that position at the time of the trial.

6. Thomas C. Reed, currently an associate of Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty and formerly Deputy Director and Chief of Litigation of Neighborhood Legal Services Association, served as co-counsel on this case.

I. HOURS SPENT

7. Plaintiff's counsel have been involved in this litigation at the trial and appellate levels. Professional services rendered in this case, excluding services rendered in connection with this petition on remand to this Court, consumed a total of 335.1 hours as follows:

A. *Trial Level*

1. James F. O'Connell — 26.5 hours total
   - Complaint - 1.5 hrs.
   - Brief for Motion - 3.0 hrs.
   - Argument May 4, 1978 - 1.0 hrs.
   - Discovery - 8.0 hrs.
   - Court Appearances 8/78 - 4.0 hrs.
   - Negotiations 9/13/78 and 10/14/78 - 5.0 hrs.
   - Consent Order - 2.0 hrs.
   - Court Appearance 10/20/78 - 2.0 hrs.

2. Timothy O'Brien — 43.0 hours total
   - *Client Contact*
   - Interviews - 8.0 hrs.
   - Phone Calls - 2.0 hrs.
   - *Pleadings*
   - Complaint -3.0 hrs.
   - Affidavits - 1.0 hrs.
   - *Briefs, Memoranda*
   - Research - 10.0 hrs.
   - Memorandum in opposition to motion to dismiss - 3.0 hrs.
   - Memorandum in support of class action certification - 5.0 hrs.
   - *Discovery*
   - Deposition - 3.0 hrs.
   - *Hearing, Negotiations*
   - Hearing — motion to dismiss abstention - 1.0 hrs.
   - Informal conference - 1.0 hrs.
   - Hearing — motion to dismiss for mootness - 1.0 hrs.
   - Negotiations - 5.0 hrs.

3. John W. DiNeen — 41.0 hours total
   - Complaint - 8.0 hrs.
   - Research and brief — abstention - 10.0 hrs.
   - Hearing — abstention - 3.0 hrs.

Telephone, correspondence & review of defendant's pleadings - 5.0 hrs.
Deposition and review of jail records- 6.0 hrs.
Research and brief — motion for preliminary injunction - 3.0 hrs.
Meeting with defendants and counsel - 2.0 hrs.
Research and preparation for 10/20/78 hearing - 2.0 hrs.
Hearing 10/20/78 - 2.0 hrs.

B. *Court of Appeals*

1. Thomas C. Reed 96.1 hours total
Preparation & hearing before Judge Knox - 5.0 hrs.
Preparation, perfection of Notice of Appeal - .5 hrs.
Letter to Clerk of Third Circuit - .2 hrs.
Preparation of appendix designation- 1.0 hrs.
Preparation of Petition for Leave to File Reduced Copies - .8 hrs.
Preparation of Stipulation - .8 hrs.
Research and drafting of Brief and preparation of appendix - 30.0 hrs.
Review of Appellees' brief - 2.0 hrs.
Research and drafting of Reply brief- 6.0 hrs.
Attendance at oral argument in *Virginia Supreme Court v. Consumers Union* - 10.0 hrs.
Preparation for oral argument - 6.0 hrs.
Oral argument before Third Circuit- 7.0 hrs.
Research, draft letter brief as per Order of Third Circuit - 3.0 hrs.
Prepare Bill of Costs - 2.0 hrs.
Review file and prepare schedule of hours - 1.8 hrs.
Telephone and correspondence - 10.0 hrs.

C. *Opposition to Defendant's Petition for Writ of Certiorari to United States Supreme Court*

1. Timothy O'Brien 128.5 hours total
   Review & analysis of Defendant's petition - 10.5 hrs.
   Preparation of opposition petition, review of bills and research - 79.0 hrs.
   Drafting - 30.0 hrs.
   Telephone - 2.0 hrs.
   Discussions with Director of litigation re strategy - 3.0 hrs.
   Review of amicus briefs - 4.0 hrs.

II. REASONABLE HOURLY RATES

8. The reasonable hourly fee requested for James O'Connell for his services provided at the trial level is $55.00 per hour.*

9. The reasonable hourly fee requested for Timothy O'Brien for his services provided at the trial level is $55.00 per hour.* The reasonable hourly rate requested for services rendered in connection with the brief in opposition to the petition for writ of certiorari to the United States Supreme Court is $75.00 per hour.

10. The reasonable hourly fee requested for John DiNeen for services provided at the trial level is $55.00 per hour.*

11. The reasonable hourly fee requested for Thomas Reed for services rendered at the appellate level is $75.00 per hour.

---

* It should be noted that at the first hearing before this Court, the parties stipulated to the very conservative hourly rate of $40.00 per hour for each of the three trial attorneys. Whether this stipulation is binding on the parties is for this Court's determination, however plaintiffs contend that application of the appropriate analysis as discussed in the Memorandum in support of this Petition, would support a reasonable hourly rate in excess of $55.00 which is being requested for trial level work.

12. Based on the required reasonable hourly fees set forth above, the fees attributable to counsels' services in this case is as follows:

James O'Connell		$ 1,457.50
Timothy O'Brien		12,002.50
Trial	$2,365.00	
Supreme Court	9,637.50	
John DiNeen		2,255.00
Thomas Reed		7,207.50
	Total	$22,922.50

13. On information and belief, the hourly rates set forth above are equivalent to or less than the prevailing hourly rate for attorneys in the Pittsburgh area with similar qualifications and experience providing similar types of legal services.

14. Plaintiffs do not contend that the reasonable hourly rates set forth above should be increased by a contingency factor.

15. Plaintiffs do request that in view of the modest hourly rates requested, the novelty of the issues presented by this matter and the quality of work reflected in the briefs, papers and pleadings filed in this matter, that the Court award an increment of 50 percent for the quality of counsels' work.

III. OUT-OF-POCKET COSTS

16. Out-of-pocket expenses in this matter, excluding amounts expended in preparation of this Petition, amounted to $688.70. Reimbursement in the amount of $190.70 was received in February of 1981. Accordingly, the sum of $498.00 is due to plaintiffs.

		$158.45
Trial Level		Total
Filing Fee (Complaint)	$15.00	
Marshal's Costs: service and subpoena	62.60	

Deposition Expense (Warden Mastrofrancesco)	60.35	
Witness Fees (Anthony Mastrofrancesco)	20.00	
Copy of Court Order	.50	
		$190.70
Court of Appeals		Total
Payment received 2/16/81		
		$339.55
Supreme Court		Total
Cost of printing briefs	$329.55	
Cost of mailing briefs	10.00	
		$498.00

IV. CONCLUSION

The total hours worked multiplied by the requested reasonable hourly rates aggregates to $23,653.75. With an increment for quality of work of 50 percent, the award for counsel fees would be $35,480.00. Plaintiffs' unreimbursed out-of-pocket expenses amount to $498.00. After affording counsel full opportunity to comment and present evidence on the experience of counsel, market hourly rates, quality of legal services, and all other matters raised by this Petition and the Memorandum in support thereof, it is respectfully requested that this Court make such award for counsel fees and costs as it deems just.

Respectfully submitted,

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Susan A. Gromis

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Pittsburgh, Pennsylvania 15222
(412) 471-3490

Counsel for Plaintiffs

Dated: April 30, 1981

EXHIBIT 2

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-267

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

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JOHN J. AYOOB, HUGO R. IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH J. LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE SHAFFER, MILTON H. RICHAEL, individually, and as District Magistrates in the County of Beaver, and their successors in office,

Defendants.

SUPPLEMENTAL PETITION FOR ATTORNEYS' FEES AND COSTS

AND NOW, come the plaintiffs and their attorneys Neighborhood Legal Services Association and Titus Marcus & Shapira, and request this Honorable Court to award attorneys' fees pursuant to 42 U.S.C. §1988, the Civil Rights Attorneys' Fees Awards Act of 1976. In support thereof, plaintiffs set forth the following:

1. On May 1, 1981, plaintiffs' attorneys filed a "Petition of Plaintiffs and Plaintiffs' Counsel for Attorneys' Fees", and a "Memorandum in Support of Petition for Attorneys' Fees." Such petition represented the hours and costs expended in pursuance of plaintiffs' claim at the trial level, and in pursuance of attorneys' fees before

this Court, the Third Circuit Court of Appeals, and the United States Supreme Court.

2. This supplemental petition is submitted for the purpose of recovering attorneys' fees and costs for services performed on remand to this Court. As stated in the supporting memorandum to the first petition, "attorneys may be awarded . . . compensation for the expenses of and time spent litigating the issue of reasonable fee — *i.e.*, for time spent on the fee application and successful fee appeals." *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978) ("Prandini II").

3. Professional services rendered in connection with the fee petition on remand to this Court consisted of review of all relevant briefs, opinions, and backgrounds and experience of the NLSA attorneys who worked on this case, research and preparation of the two petitions for attorneys' fees, attendance at depositions of Timothy O'Brien and John J. McLean, Jr. and preparation for and attendance at the May 4th and May 15th hearings before this Court.* The hours were spent as follows:

Paul H. Titus	31 hours
Susan A. Gromis	37 hours

4. The normal hourly fees usually charged by these attorneys are as follows:

	Required Hourly Fee	Recommended Hourly Fee
Paul H. Titus	$110/hr.	$140/hr.
Susan A. Gromis	$ 45/hr.	$ 55/hr.

* The total hours represent the conservative estimate of one hour for each of the attorneys for attendance at the May 15, 1981 hearing.

5. Out-of-pocket costs expended in this matter are as follows:

Expert witness fee of John J. McLean, Jr.	$1,325.00
Deposition transcript	88.80
Copying expense	12.40
TOTAL	$1,426.20

WHEREFORE, it is respectfully requested that this Court make such award for counsel fees and costs as it deems just.

Respectfully submitted,

Paul H. Titus
Susan A. Gromis

TITUS MARCUS & SHAPIRA
624 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 471-3490

Attorneys for Plaintiffs' Counsel

Dated: May 15, 1981

EXHIBIT 3

THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-267

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Plaintiffs,

v.

JOHN J. AYOOB, HUGO R. IORFIDO, ROSS M. KEEFER, LEWIS KIRCHNER, JOSEPH J. LIBERANTI, STEPHEN MICHALIC, ARTHUR L. SCHLEMMER, GEORGE SHAFFER, MILTON H. RACHAEL, individually and as District Magistrates in the County of Beaver, and their successors in office,

Defendants.

OPINION

DIAMOND, *J*.

I.

The complaint in this action was filed in March of 1978 against nine incumbent District Justices of Beaver County. The factual and procedural background of the case is summarized in *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). We supplement that history by noting that upon remand to this Court, counsel agreed that the proper fee determination could be based on the record which had been developed through the hearings held before Judge Knox.[1]

1. Said agreement was made at the status conference held by this Court on March 19, 1982.

In addition, we are now faced with fee requests from two distinct organizations; namely, Neighborhood Legal Services and the Pittsburgh law firm of Titus, Marcus & Shapira. Each will be considered separately.

II. Neighborhood Legal Services

The Third Circuit has outlined and refined certain criteria to be used in calculating the amount to be awarded in attorneys' fees. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) ("*Lindy I*"); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*"). Essentially, four factors must be given consideration: the hours spent, the hourly rate, the contingency factor, and the quality factor.

A. *Hours Spent*

When determining how many hours were spent by any one attorney, the Court should "given credit only for the hours of legal service reasonably supportive of such claims." *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978). Counsel for the plaintiffs have presented to the Court the following time listings:

James O'Connell	26.5 trial hours (See App. I)
John DiNeen	41.0 trial hours (See App. II)
Thomas Reed	96.1 appellate hours (See App. III)
Timothy O'Brien	43.0 trial hours
	128.5 appellate hours (See App. III)

Appendix I reflects an itemized breakdown of the time Mr. O'Connell spent on this case. Upon review, we find the claim for those hours to be reasonable and acceptable. Appendix II reflects Mr. DiNeen's time, and that claim is also found to be reasonable.

Upon review of Mr. Reed's claim, itemized in Appendix III, we find the hours to be reasonable and acceptable, with the exception of one item: the time spent

in attendance at oral argument in another case before the Supreme Court. Under the law of this Circuit, we are required to determine "whether it was reasonably necessary to spend that number of hours in order to perform the legal services for which compensation is sought." *Hughes v. Repko*, 578 F.2d at 487; *see also Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975.) While attendance at that argument may have been an educational and helpful experience for the attorney involved, essentially the same results were available to the attorney through other means, such as review of Law Week. We find those hours, therefore, to be an inappropriate burden to place on the defendants in this case, and reduce Mr. Reed's hours to 86.1.

We turn then to Timothy O'Brien's hours, delineated in Appendix IV. Mr. O'Brien's 43 trial hours appear reasonable, and will be accepted. His 128.5 appellate hours, however, merit further consideration, particularly in light of the extensive work which had already been completed by Neighborhood Legal Services prior to the defendant's filing of the petition for writ of certiorari. Mr. Reed had prepared this case thoroughly for presentation at the appellate level, and we do not believe that an additional 128.5 hours were "reasonably necessary" on the part of another attorney with the case, in order to respond to the defendant's petition for certiorari. *Hughes*, *supra* at 487. Recognizing that we should not reduce an award in "an arbitrary or indiscriminate fashion," *Prandini v. National Tea Co.*, 585 F.2d 47, 52 (3d 1978), we note that it is the 79.0 hours figure, described as "preparation of opposition petition, review of bills and research" which appears too high to be reasonable. Given the solid foundation already built in the matter prior to Mr. O'Brien's appeal work, we reduce that figure to 50.0 hours, thus giving Mr. O'Brien a total of 99.5 appellate hours.

B. *Hourly Rate*

The second step of the *Lindy* analysis is for the Court to set a reasonable value for the services rendered. Neighborhood Legal Services has asked this Court to approve $55 per hour for trial work, and $75 per hour for appellate work.

Months ago, however, the parties stipulated before Judge Knox that $40 per hour would be appropriate.[2] What was once stipulated to be reasonable for trial work performed in 1978 should still be considered reasonable. Thus, the $40 per hour figure will be applied to the time spent at the trial level.

As to the hours spent on the appellate level, we recognize that the stipulation may not have contemplated future appellate-level work, and that the charge for such work could be higher than $40 an hour. A review of the relevant case law indicates that a rate of $70 per hour would be more reasonable. *See Meisel v. Kremems*, 80 F.R.D. 419 (E.D.Pa. 1978) (Higgenbotham, Circuit Judge, sitting by designation); *Levin v. Parkhouse*, 484 F.Supp. 1091 (E.D.Pa. 1980).

C. *The Lodestar*

O'Connell	26.5 trial hours x $40/hour	= $1,060
O'Brien	43.0 trial hours x $40/hour	= $1,720
	99.5 appellate hours x $70/hour	= $6,965
DiNeen	41.0 trial hours x $40/hour	= $1,640
Reed	86.1 appellate hours x $70/hour	= $6,027

D. *Contingency Factor*

The Third Circuit set forth the factors to be considered in analyzing contingency in *Lindy II*, 540 F.2d 102 (3d Cir. 1976):

> "1. Analysis of plaintiff's burden. Subsumed in this category are the following considerations: (a) the complexity of the case, — legally and factually; (b)

2. See transcript of March 27, 1979 proceedings, pages 33-38.

the probability of defendant's liability, — whether it is clear or dubious; whether it has been previously suggested by other civil or criminal proceedings; whether it is asserted under existing case law or statutory interpretation, or is advanced as a novel theory; (c) an evaluation of damages, — whether the claims would be difficult or easy to prove.

"2. Risks assumed in developing the case. This category subsumes consideration of: (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; (c) the development of prior expertise in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy.

"3. The delay in receipt of payment for services rendered."

Plaintiff has represented to the Court that this factor, which can only be used to increase an award, rather than decrease it, does not apply to the situation herein.

E. *Quality Factor*

The quality to be considered at this stage is the quality of the performance of each of the particular attorneys in the case presently before us. "Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good." *Lindy I*, *supra* at 168. "It may be considered in the nature of a bonus or penalty." *Lindy II*, *supra* at 118. And finally, in *Baughman v. Wilson Freight*, 583 F.2d 1208, 1219 (3rd Cir. 1978), the court noted that ". . . only in the most un-

usual circumstances will the quality of the attorney's work justify so large an increase [1.5] as was allowed in this case."

For the most part, we have found Neighborhood Legal Services' hours and rates to be fair and reasonable. After an evaluation of both the result obtained and the methods used by Neighborhood Legal Services to process the case, *see Lindy II*, *supra* at 118, we do not believe that the lodestar should be reduced or increased by a quality factor in this case.

Thus, total fees to be awarded to Neighborhood Legal Services amount to $17,412.00.

F. *Costs*

Neighborhood Legal Services also asks for $498.00 in costs. A breakdown of that sum shows that Neighborhood Legal Services paid the filing fee, the Marshal's costs, deposition expenses and printing costs. Under *Wehr v. The Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), and because we find those expenses reasonable, those costs will be awarded to the plaintiff.

III. Titus, Marcus & Shapira

The law firm of Titus, Marcus and Shapira was called into this case by Neighborhood Legal Services to deal particularly with the request for attorney's fees. As outlined in the Supplemental Petition for Attorney's Fees and Costs, the services rendered by Mr. Paul H. Titus and Ms. Susan A. Gromis included: "review of all relevant briefs, opinions and backgrounds and experiences of the Neighborhood Legal Services Association attorneys who worked on this case, research and preparation of the two petitions for attorney fees, attendance at deposition of Timothy O'Brien and John J. McLean, Jr. and preparation for and attendance at the May 4th and May 15th hearings. . . ." The total hours claimed by the two counsel are as follows:

Paul H. Titus	31 hours
Susan A. Gromis	37 hours.

Defendants contest, as a preliminary matter, the validity of bringing in a second set of attorneys to continue the work initiated by the first set of attorneys. We find nothing in the situation itself which is indicative of any bad faith on the part of plaintiffs, or excessive billing. Defendants next argue that much of the work done by Titus was duplicative of the work done previously by Neighborhood Legal Services, and thus should not be reimbursed. It appears from the record presented by Titus, Marcus & Shapira that the hours spent by the firm were reasonable, and thus, they will be accepted by this Court.[3]

The second step, after determining the number of hours, is to determine a reasonable hourly rate. Mr. Titus has noted that his required hourly rate is $110/hour, while his recommended hourly rate is $140/hour. Ms. Gromis has asked for $45/hour as her required rate, and $55/hour as her recommended rate.

We will allow Mr. Titus and Ms. Gromis to charge their respective "required" rates. Thus, the total fee recovery for Titus, Marcus & Shapira will be:

Mr. Titus	31 hours ×	$110/hour =	$3,410
Ms. Gromis	37 hours ×	$ 45/hour =	1,665
			$5,075

The contingency factor is inapplicable to this situation, and any application of the quality factor will be denied for essentially the same reasons set forth above with regard to Neighborhood Legal Services.

As to the costs expended by Titus & Marcus, the $88.80 for the deposition transcript and the $12.40 for copying will be paid by the defendants. In that Mr. John J. McLean, Jr.'s testimony was helpful to the Court, his

3. We call the parties' attention to *Shadis v. Beal*, No. 82-1260 (3d Cir. March 31, 1983), a recent opinion concerning attorneys' fees, and note that Titus, Marcus & Shapira does not seek monetary recovery for time spent on anything other than the prosecution of Neighborhood Legal Services' petition for fees.

witness fee of $1,325.00 will also be paid by the defendants.

IV. Post-Lindy Discretionary Adjustment

In statutory fee cases, this analysis allows a court to evaluate the fee in light of the purposes behind the awarding of fees. A court can then, in essence, evaluate the overall reasonableness of a given fee. Here, plaintiffs' actions have arguably benefited others, and no post-Lindy adjustment factor will be applied to lower the amount of the awarded counsel fees.

V. The Signatures on the Consent Agreement

Defendants' final argument is that it would be grossly unfair to hold the other eight Justices, aside from Mr. Ayoob, liable for the fee award, as no facts were proven against them, and they did not sign the consent agreement. While on a practical level we are unsure as to how such an apportionment would benefit the defendants as a whole, especially in light of the Third Circuit's opinion in this case, we note that an authorized stipulation, compromise or dismissal without prejudice may be ratified by implication, or an estoppel or waiver may be created by the client accepting the resulting fruits without knowledge, by inattention, negligence, or by acquiescence. *Whitebird v. Eagle-Pitcher*, 258 F.Supp. 308 (D.C.Okl. 1966). Failure to protest a settlement within a reasonable period of time, where allegedly the settlement was entered by the attorney without authority, works a ratification of the settlement. *Williams v. International Association of Machinists & Aerospace Workers*, 484 F.Supp. 917 (D.C.Fla. 1978), aff'd 617 F.2d 441 (5th Cir.) *cert. denied*, 101 S.Ct. 118 (1980).

It is clear that recovery in this case is sought from the defendants in their official capacity only, and as such, recovery may be had "from the individual defendants in their official capacities or directly from the state agencies." *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 496 (3d Cir. 1978). The

money should, therefore, be drawn from the budgets of all the defendants' offices. Should that source, however, prove to be inadequate, the remaining funds would then come from both the state and the county's court administration budgets, in equal parts. Such a conclusion is based not only on the identity and relationship of each of those two entities to the actual parties sued, but also on the involvement of counsel for each of them, as counsel from the State and counsel from Beaver County both took an active part in the proceedings.

For the reasons set forth above, Neighborhood Legal Services will be awarded attorney's fees and costs in the amount of $17,910.00, and Titus, Marcus & Shapira will be awarded $6,501.20.

_____

United States District Judge

Dated: April 7, 1983.

cc: All counsel of record.

APPENDIX I

James F. O'Connell	*26.5 Hours-Total Trial Hours*
Complaint	- 1.5 hrs.
Brief for Motion	- 3.0 hrs.
Argument May 4, 1978	- 1.0 hrs.
Discovery	- 8.0 hrs.
Court Appearances 8/78	- 4.0 hrs.
Negotiations 9/13/78 and 10/14/78	- 5.0 hrs.
Consent Order	- 2.0 hrs.
Court Appearance 10/20/78	- 2.0 hrs.

APPENDIX II

John W. DiNeen	*41.0 Hours-Total Trial Hours*
Complaint	- 8.0 hrs.
Research and brief — abstention	- 10.0 hrs.
Hearing — abstention	- 3.0 hrs.
Telephone, correspondence & review of defendant's pleadings	- 5.0 hrs.
Deposition and review of jail records	- 6.0 hrs.
Research and brief — motion for preliminary injunction	- 3.0 hrs.
Meeting with defendants and counsel	- 2.0 hrs.
Research and preparation for 10/20/78	- 2.0 hrs.
Hearing 10/20/78	- 2.0 hrs.

APPENDIX III

Thomas C. Reed	*96.1 Hours-Total Appellate Hours*
Preparation & hearing before Judge Knox	- 5.0 hrs.
Preparation, perfection of Notice of Appeal	- .5 hrs.
Letter to Clerk of Third Circuit	- .2 hrs.
Preparation of appendix designation	- 1.0 hrs.

Preparation of Petition for Leave to File Reduced Copies	- .8 hrs.
Preparation of Stipulation	- .8 hrs.
Research and drafting of Brief and preparation of appendix	- 30.0 hrs.
Review of appellees' brief	- 2.0 hrs.
Research and drafting of reply brief	- 6.0 hrs.
Attendance at oral argument in *Virginia Supreme Court v. Consumers Union*	- 10.0 hrs.
Preparation for oral argument	- 6.0 hrs.
Oral argument before Third Circuit	- 7.0 hrs.
Research, draft letter brief as per Order of Third Circuit	- 3.0 hrs.
Prepare Bill of Costs	- 2.0 hrs.
Review file and prepare schedule of hours	- 1.8 hrs.
Telephone and correspondence	- 10.0 hrs.

APPENDIX IV

	43.0 Hours-Total Trial Hours
Timothy O'Brien	
Client Contract	
Interviews	- 8.0 hrs.
Phone Calls	- 2.0 hrs.
Pleadings	
Complaint	- 3.0 hrs.
Affidavits	- 1.0 hrs.
Briefs, Memoranda	
Research	- 10.0 hrs.
Memorandum in opposition to motion to dismiss	- 3.0 hrs.
Memorandum in support of class action certification	- 5.0 hrs.
Discovery	
Deposition	- 3.0 hrs.

Hearing, Negotiations	
Hearing — motion to dismiss abstention	- 1.0 hrs.
Informal conference	- 1.0 hrs.
Hearing — motion to dismiss for mootness	- 1.0 hrs.
Negotiations	- 5.0 hrs.
	128.5 Hours-Total Appellate Hours
Timothy O'Brien	
Review & analysis of Defendant's petition	- 10.5 hrs.
Preparation of opposition petition, review of bills and research	- 79.0 hrs.
Drafting	- 30.0 hrs.
Telephone	- 2.0 hrs.
Discussions with Director of litigation re strategy	- 3.0 hrs.
Review of amicus briefs	- 4.0 hrs.

EXHIBIT 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5336

PATRICIA MORRISON, BLANCHE LOWE,
RACHEL DAWKINS, GEORGE BLACK,
and all others similarly situated

v.

JOHN J. AYOOB, HUGO R. IORFIDO,
ROSS M. KEEFER, LEWIS E. KIRCHNER,
JOSEPH J. LIBERATI, STEPHEN MIHALIC,
ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER,
MILTON H. RICHEAL, individually and as
District Magistrates in the County of
Beaver and their successors in office,
Appellants.

Appeal from the United States District Court
for the Western District of Pennsylvania — Pittsburgh
(D.C. Civil No. 78-0267)
District Judge: Honorable Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
January 10, 1984
Before: ALDISERT, HIGGINBOTHAM, and SLOVITER,
Circuit Judges.

January 16, 1984

MEMORANDUM OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge.*

The appellants, nine incumbent district justices in Beaver County, Pennsylvania, appeal from an order of

the district court awarding attorney's fees, pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988 (1976), to a law firm for its services in preparing and presenting a fee petition on behalf of the Neighborhood Legal Services Association which represented the prevailing plaintiffs in the underlying civil rights action.

Plaintiffs, a class of indigents residing in Beaver County, brought an action for declaratory and injunctive relief against defendant-appellants in their official and individual capacities. Plaintiffs challenged the alleged practices of these district justices of sending convicted indigents to jail for summary offenses without affording them right to counsel. The case was dismissed as moot and plaintiffs moved for and were denied attorney's fees.

In *Morrison v. Ayoob*, 627 F.2d 669, 673 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), this court reversed the order of the district court denying the award of attorney's fees and remanded this action to the district court to properly frame the award. On remand, the district court considered the fee requests of the Neighborhood Legal Services Association, plaintiffs' counsel as well as the fee requests of the Pittsburgh law firm of Titus, Marcus & Shapira, retained by Neighborhood Legal Services Association to represent them in the fee award proceedings. The district court entered an order awarding attorney's fees to Neighborhood Legal Services in the amount of $17,412.00 plus costs and to Titus, Marcus & Shapira in the amount of $5,075.00 plus costs.

This appeal challenges not only the reasonableness of the award of attorney's fees to Titus, Marcus & Shapira, but seeks this Court's reconsideration of the issue of whether judicial immunity bars recovery of attorney's fees against these district justices. We decline to reconsider the judicial immunity issue and find appellants' allegations regarding the award of legal fees to be without merit. We will therefore affirm the district court's decision.

Conceding that this issue has previously been ar-

gued unsuccessfully to this court, appellants would have us disregard the "law of the case" doctrine and reconsider the issue of whether the doctrine of judicial immunity bars awards of attorney's fees pursuant to 42 U.S.C. §1988 against members of the judiciary for actions taken in their judicial capacity on the ground of "public importance."

The well established "law of the case" doctrine declares that generally the prior decision of legal issues involving the same parties in the same case must be followed on a later appeal unless subsequent controlling authority has since made the earlier decision erroneous. As Chief Judge Seitz stated in *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 476 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979), *on remand*, 501 F.Supp. 1360 (M.D. Pa. 1980), by the "law of the case," a panel is "bound by the earlier determination of this Court" on an issue which has been decided by an earlier panel or an en banc decision in the very same case.

In *Kimball v. Callahan*, the Court of Appeals for the Ninth Circuit, quoting the Fifth Circuit, has framed the doctrine as follows:

> under the "law of the case" doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case. As the court stated in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-63 (5 Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975):
>
> > This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal".

> While the "law of the case" doctrine is not "an inexorable command", the prior decision of legal issues should be followed on a later appeal "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice". *White v. Murtha*, *supra*, 377 F.2d [428,] at 431-32 [(5th Cir. 1967).]

Kimball v. Callahan, 590 F.2d 768, 771-72 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (footnote omitted).

Appellants have not argued that any of these exceptional circumstances control this case, nor do we find any on this record. Therefore, we conclude that the determination by the previous panel in *Morrison v. Ayoob*, 627 F.2d at 672, that the doctrine of judicial immunity does not bar recovery of attorney's fees by a prevailing party under Section 1988 from judicial officers in their official capacity, stands as the law of the case and we are bound by it. *Todd and Co. v. Securities and Exchange Commission*, 637 F.2d 154, 156-57 (3d Cir. 1980); *U.S. v. American Bag and Paper Corp.*, 609 F.2d 1066, 1068, n.3 (3d cir. 1979); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d at 476. We conclude therefore that appellants may not obtain reconsideration of this issue on this appeal.

The appellants also contest the district court's award of counsel fees to two members of the law firm of Titus, Marcus & Shapira for legal services rendered in the preparation and presentation of Neighborhood Legal Services' fee application. Appellants maintain that (1) in calculating the hours necessary to perform the services, the district court failed to give any consideration to the simplicity of the matter, (2) the number of hours spent were duplicative of those of Neighborhood Legal Services, (3) the hourly rates were unreasonable, and (4) the rate of compensation was excessive under this

Court's reasoning in *Shadis v. Beal*, 703 F.2d 71 (3d Cir. 1983). We reject appellants' contentions and conclude that the district court properly determined that the award of attorney's fees was reasonable.

The services rendered by Mr. Paul H. Titus, a senior partner, and Ms. Susan A. Gromis, a junior associate at Titus, Marcus & Shapira included.

> review of all relevant briefs, opinions and backgrounds and experiences of the Neighborhood Legal Services Association attorneys who worked on this case, research and preparation of the two petitions for attorneys' fees, attendance at deposition of Timothy O'Brien and John J. McLean, Jr. [Neighborhood Legal Services Association attorneys] and preparation for and attendance at the . . . hearings . . .

Appendix ("App.") at R-3F to R-3G. Mr. Titus claimed a total of 31 hours expended and noted that his "required" hourly rate is $110/hour, while his "recommended" hourly rate is $140/hour. Ms. Gromis claimed 37 hours of legal services rendered and a "required" rate of $45/hour as well as a "recommended" rate of $55/hour. The district court found that the hours spent were reasonable and allowed counsel to charge their respective required rates. The lodestar was thus:

Mr. Titus	31 hours x $100/hour =	$3,410
Ms. Gromis	37 hours x $ 45/hour =	1,665
		$5,075

The district court further concluded that the award did not require increase or decrease by any contingency factors or quality factors and as a whole was reasonable in light of the public benefit derived from this particular class action. Additionally, the district court awarded costs.

In reviewing a district court's determination pursuant to the Civil Rights Attorneys' Fees Award Act, this Court applies an abuse of discretion standard of review.

Hughes v. Repko, 578 F.2d 483, 486 (3d Cir. 1978). Since appellants attack the legal bases for the district court's determination, we must consider the legal correctness of the district court's ruling *Id.*

It is well established in this Circuit that the "lodestar" approach is the proper first step in calculating attorney's fees under the Act.[1] Four factors are to be considered in determining "reasonableness": The hours spent, the hourly rate, the contingency factor, and the quality factor. The district court determined the hours devoted and concluded that they were reasonably necessary to perform the legal services for which compensation was sought. The simplicity of the issues involved is a factor reflected in the court's determination of the services rendered in this fee application, contrary to appellants' assertions that this was given no consideration.

The district court also expressly rejected appellants' argument below that the hours spent were duplicative, and called the parties' attention to our recent decision in *Shadis v. Beal*, 703 F.2d 71, 73 (3d Cir. 1983), to note that "Titus, Marcus & Shapira does not seek monetary recovery for time spent on anything other than the prosecution of Neighborhood Legal Services' petition for fees." App. at R-3G, n.3. In *Shadis*, we denied recovery of attorney's fees to a law firm which represented another attorney in her application of attorneys' fees. The law firm in *Shadis*, unlike in the present action, sought to recover fees for time expended in preparing *its own* fee petition. The district court in the case at bar found

1. Lindy Brothers Builders of Philadelphia v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I); Lindy Brothers Builders of Philadelphia v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II); Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974) (Merola I); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975) (Merola II); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 2977) (Prandini I); Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978) (Prandini II); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).

that there was "nothing in the situation itself which is indicative of any bad faith on the part of plaintiffs, or excessive billing." *Id.*

After determining the number of hours, the district court concluded that the required rates claimed were reasonable hourly rates, taking into account the positions held in what appellant has characterized as a "very reputable" Pittsburgh firm. (Brief and Appendix for Appellants at 26). Nor is this rate of compensation "excessive" under our reasoning in *Shadis*. The time the Titus firm spent preparing the Neighborhood Legal Services' fee petition is the time the organization would have expended had it prosecuted its own petition for fees. *Shadis* does not challenge the proposition that to the extent the law firm was standing in the shoes of the Neighborhood Legal Services Association, the firm should be recompensed for the effort made in preparing that fee petition. 703 F.2d at 73. We therefore reject appellants' arguments concerning the lodestar.

The appellants do not challenge the district court's decision not to apply the contingency factors or quality factors. Nor do we feel it necessary to expand upon those points since we are of the opinion that the district court correctly applied the controlling standards.

Accordingly, we hold that the district did not abuse its discretion in awarding counsel fees to the Titus firm and therefore, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

A. Leon Higginbotham

Circuit Judge

EXHIBIT 5

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5336

PATRICIA MORRISON, BLANCHE LOWE,
RACHEL DAWKINS, GEORGE BLACK,
and all other similarly situated

v.

JOHN J. AYOOB, HUGO R. IORFIDO,
ROSS M. KEEFER, LEWIS E. KIRCHNER,
JOSEPH J. LIBERATI, STEPHEN MIHALIC,
ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER,
MILTON H. RICHAEL, individually and as
District Magistrates in the County of
Beaver and their successors in office,

Appellants

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asking for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the Court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

By the Court,

A. Leon Higginbotham, Jr.

Circuit Judge

DATED: February 15, 1984

Patricia Morrison, etc., et al.
v. John J. Ayoob, etc.
No. 83-5336

Statement Sur Denial of Rehearing

ADAMS, *Circuit Judge*.

I vote for rehearing because of two primary concerns.

First, I am disturbed by the fact that a law firm will be awarded over $5,000.00 solely for preparing and advancing a fee petition covering legal services alleged to be worth approximately $17,000.00. The preparation of that petition had nothing to do with the merits of the plaintiffs' original claim or with the social policy of encouraging lawyers to counsel clients who would otherwise go unrepresented. Aside from the question whether, absent special circumstances, one group of lawyers should file a fee petition for lawyers who have actually litigated a controversy, I do not believe that we should sanction such a large award of fees when one set of counsel hires more expensive counsel to advance a fee petition.

Second, and perhaps more important, I note that the Supreme Court has recently heard argument in a case involving the more fundamental question presented by this appeal: whether judicial immunity bars

the award of attorneys' fees under 42 U.S.C. §1988 against members of the judiciary who have acted in their official capacity. *Pulliam v. Allen*, 51 U.S.L.W. 3770 (U.S. April 25, 1983) (No. 82-1432). If the present case were to come before a panel now, it would seem manifest that the appropriate course would be to hold the matter under advisement until the Supreme Court had definitively decided the issue. I think it only fair to the defendants that we accord their case the same functional status, by holding it over for in banc consideration until *Pulliam* has been resolved.

Judges Hunter, Weis, and Becker join in this statement.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

83-1575

Office - Supreme Court, U.S.
FILED
APR 25 1984
STEVAS

No.

In the Supreme Court of the United States

October Term, 1983

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents,

v.

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHENER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHEAL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners.

Respondents' Brief In Opposition

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Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Where petitioners' judicial immunity argument was previously decided adversely to petitioners by the Court of Appeals for the Third Circuit in its earlier decision in this case, *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), certiorari was denied by this Court on this issue, 449 U.S. 1102 (1981), and the Third Circuit refused to review the question again based upon the doctrine of law of the case, F.2d (3d Cir. 1984), should petitioners be precluded from obtaining review before this Court?

2. Are there special and important reasons justifying this Court's granting of review on writ of certiorari to review a trial court's exercise of discretion with respect to the reasonableness of an award of counsel fees pursuant to 42 U.S.C. §1988?

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SUMMARY OF ARGUMENT

In 1980 the United States Court of Appeals for the Third Circuit held as a matter of law that judicial immunity did not bar the award of attorney's fees to respondents, and this Court denied review on writ of certiorari. In 1984, upon appeal by petitioners following remand, the Court of Appeals for the Third Circuit held that its prior judicial immunity holding was the law of the case, precluding the reconsideration of this question. To permit petitioners to seek review of an issue which has already been finally decided against them violates law of the the case principles and encourages parties to prolong litigation and seek repeated appellate review.

The district court's award of counsel fees included fees for separate counsel who handled the hearings to determine an appropriate award to the legal services organization which represented the prevailing party. The district court's exercise of discretion in awarding fees was affirmed by the court of appeals. Clearly there are no special or important reasons justifying review of the district court's exercise of discretion.

ARGUMENT

1. The holding that judicial immunity does not preclude an award of attorney's fees in this case has been finally determined and may not be relitigated here.

In 1980 the United States Court of Appeals for the Third Circuit held that: (1) respondents were prevailing parties within the meaning of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988; (2) judicial immunity did not bar recovery of attorney's fees from justices of the peace in their official capacities; and (3) such award was not limited by the budgets of the individual district justices' offices. 627 F.2d 669. Petitioners' petition for writ of certiorari to this Court on those questions was denied. 449 U.S. 1102 (1981). After remand to the district court to determine an appropriate attorney's fees award, petitioners appealed from that award to the United States Court of Appeals for the Third Circuit and again sought reversal on the judicial immunity question.

The Third Circuit correctly held that its reconsideration of the judicial immunity question was barred by the doctrine of the law of the case. Quoting from the decisions of the Fifth Circuit Court of Appeals in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) and the Ninth Circuit in *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979), the Third Circuit stated:

> This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

> While the "law of the case" doctrine is not "an inexorable command," the prior decision of legal issues should be followed on a later appeal "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha, supra,* 377 F.2d [428] at 431-32 (5th Cir. 1967).

This Court has similarly reaffirmed on numerous occasions its commitment to the precept that "an issue once determined by a competent court is conclusive." *Arizona v. California,* U.S. , , 103 S.Ct. 1382, 1392 (1983). The policy reasons underlying this rule were aptly stated by this Court in *Montana v. United States*:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. 147, 153-154 (1979).

So too in the present case, where petitioners have previously had a full and fair opportunity to litigate the issue of liability and have had a full appellate review including seeking this Court's review on writ of certiorari, petitioners may not again subject respondents and the judicial system to further relitigation of this question. Petitioners' own oft-stated concern in this protracted litigation for conserving judicial resources and public funds would be best served by allowing this matter to come to an end. Even if this Court should decide the issue of the immunity of justices of the peace in a manner contrary to the original decision

in this case in the pending appeal, the within petition for certiorari should be denied nonetheless. This Court ought not reward successive resort to full appellate review on a matter which has already been finally decided.

2. **The reasonableness of the award of attorney's fees for the presentation of the fee petition is not a question meriting this Court's review on writ of certiorari.**

In the original district court proceedings the justices of the peace were represented by staff counsel for the Administrative Office of the Pennsylvania Courts. On appeal their position was argued by eminent private counsel including a distinguished former Justice of the Pennsylvania Supreme Court. On remand to the district court Neighborhood Legal Services Association sought the assistance of separate counsel in presenting the petition for fees. Petitioners contend in their Petition that the time spent by that private law firm in preparing and presenting the fee petition, and the fees charged for their work, exceed that which would have been expended by Neighborhood Legal Services Association for prosecution of the fee petition. Petitioners claim that these contentions merit this Court's review on writ of certiorari.

With respect to the time expended by the private counsel, the Court of Appeals affirmed the findings of the district court and held that "[t]he time the Titus firm spent preparing the Neighborhood Legal Services' fee petition is the time the organization would have expended had it prosecuted its own petition for fees." F.2d , (1984). Petitioners' efforts to have this Court reconsider and overturn such an express factual finding is simply inappropriate for review. This Court does not use its writ of certiorari to reconsider fact finding by lower federal courts.

With respect to petitioners' second contention, *i.e.*, that the rates charged by private counsel exceeded that which would have been charged by Neighborhood Legal Services and that the award was therefore unreasonable, the very recent decision of this Court in *Blum v. Stenson*, 52 U.S.L.W. 4377 (March 21, 1984) (No. 81-1374) disposes of any argument which petitioners might make.

> The statute and legislative history [of 42 U.S.C. §1988] establish that "reasonable fees" under §1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.

52 U.S.L.W. at 4379.

Since there exist no special or important reasons justifying this Court's review of the district court's exercise of discretion in making the attorney's fees award in this case, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons described herein, respondents respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

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Counsel for Respondents

DATED: April 24, 1984

CERTIFICATE OF SERVICE

This is to certify that three copies of the Brief of Respondent in Opposition were served upon opposing counsel this 24th day of April, 1984, by depositing in the U.S. Mail, with proper postage affixed, addressed to:

Charles W. Johns, Esquire
Alan C. Milstein, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102

/s/ PAUL H. TITUS